

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES J. REILLY,

Plaintiff,

v.

KEYSTONE HEALTH PLAN EAST, INC.,

Defendant.

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Civil Action No. 98-1648

MEMORANDUM

R.F. KELLY, J.

JULY 22, 1999

Before this Court is a motion for summary judgment filed by Defendant Keystone Health Plan East ("Keystone"). The instant action was originally filed by Plaintiff Charles Reilly in the Court of Common Pleas of Montgomery County. Subsequently, Defendant removed the matter to this Court, as the health plan at issue is governed by the express provisions of the Employee Retirement and Income Security Act ("ERISA"). 29 U.S.C.A. § 1132(e) (1999).

On August 24, 1998, Plaintiff filed an amended complaint with this Court. In the amended complaint, Plaintiff alleges that he suffers from a condition called Dystonia (spasmodic torticollis), a condition that causes sustained muscle spasms/contractions. Plaintiff further alleges that his treating physician, Dr. Gollomp, prescribed continuous quarterly Botulinum Toxin Type A ("Botox") injections for the treatment of Plaintiff's condition and, as a result of Defendant's failure

and/or refusal to compensate Dr. Gollomp for Botox injections, Plaintiff has filed the instant lawsuit to recover detrimental reliance damages, having allegedly been deprived of his prescribed June, 1997 Botox injection for a period of approximately three (3) months. See First Amended Complaint, ¶ 14.

On May 11, 1999, Keystone filed the instant motion, arguing that, based on the answers given by Plaintiff to Keystone's interrogatories, Plaintiff failed to identify any expense or financial loss that he incurred as a result of the alleged conduct of Keystone. Rather, as alleged damages, Plaintiff states that Keystone's conduct resulted in the cessation of necessary and prescribed treatment -- Botox injections -- for Plaintiff's spasmodic torticollis. According to Keystone, the damages actually sought by Plaintiff can be categorized as "extracontractual damages" and are not recoverable in an ERISA action. Thus, Keystone contends that because Plaintiff cannot recover monetary, compensatory or punitive damages, and Plaintiff has no evidence of out-of-pocket expenses incurred as a result of Keystone's conduct, summary judgment should be granted in Keystone's favor.

On May 27, 1999, Plaintiff responded to Keystone's Motion for Summary Judgment, denying that actual financial loss is a condition precedent to Plaintiff's cause of action under

ERISA and asserting that under ERISA Section 502(a)(3), as amended, 29 U.S.C. § 1132(a)(3), Plaintiff has a direct cause of action against Defendant for "appropriate equitable relief" to redress Defendant's ERISA violations including monetary relief in the nature of detrimental reliance damages. According to Plaintiff, reliance damages represent the exclusive equitable remedy in the instant matter by which to restore the status quo. See Plf.'s Brief at 14-15 (citing Warren v. Society Nat'l Bank, 905 F.2d 905 F.2d 975, 981 (6th Cir. 1990), overruling recognized by Fraser v. Lintas, 56 F.3d 722, 725 (6th Cir. 1995)).

For the following reasons, Keystone's summary judgment motion will be granted with respect to extracontractual damages.

STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and 'the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted).

"The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. Once the movant has done so, however, the non-moving party cannot rest on its pleadings. Rather, the non-movant must then 'make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file.'"

Nolen v. Paul Revere Life Insurance Co., 32 F. Supp.2d 211, 213 (E.D. Pa. 1998) (citations omitted).

ANALYSIS

In Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1298 (3d Cir. 1993), the Third Circuit Court of Appeals upheld the right of an individual beneficiary to recover from a fiduciary, pointing to the narrowness of the Supreme Court's holding in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985). The Third Circuit stressed ERISA's grounding in the law of trusts, and reiterated that "fundamental in the law of trusts is the principle that `courts will give to beneficiaries of a trust the remedies necessary for the protection of their interests.'" Bixler, 12 F.3d at 1299. In allowing a beneficiary to bring a direct action for breach of fiduciary duty against the trustees and administrators of an ERISA plan, the Third Circuit concluded that "[a]llowing an injured beneficiary recourse through the courts is, furthermore, essential to fulfilling the purpose of ERISA." Id.

In 1995, the Third Circuit "held that an individual participant may sue on his or her own behalf to recover equitable relief under section 1132(a)(3), and characterized reimbursements of back benefits as `remedies which are restitutionary in nature and thus equitable.'" Kemmerer v. ICI Americas, Inc., 70 F.3d

281, 289 (3d Cir. 1995), cert. denied, 517 U.S. 1209 (1996).

"`Appropriate equitable relief' generally is limited to traditional equitable relief such as restitution and injunctions rather than money damages." Ream v. Frey, 107 F.3d 147, 153 n.5 (3d Cir. 1997). "However, ERISA § 502(a)(3) does not 'necessarily bar all forms of money damage.'" Id. (citing Hein v. FDIC, 88 F.3d 210, 223-24 & n.11 (3d Cir. 1996), cert. denied, 519 U.S. 1056 (1997)). In this regard, "[t]he Eighth Circuit Court of Appeals has characterized some forms of monetary relief sought pursuant to ERISA § 502(a)(3) as restitution, so that such relief avoids the bar to monetary damages erected by Mertens[v. Hewitt Assoc., 508 U.S. 248, 256-63 (1993)]. Hein, 88 F.3d at 224 n.11 (citing Howe v. Varsity Corp., 36 F.3d 746, 756 (8th Cir. 1994), aff'd, 516 U.S. 489 (1996)).

In 1996, the United States Supreme Court decided Varsity Corp. v. Howe, 516 U.S. 489 (1996), which somewhat limits the recoverability of equitable relief by an individual plaintiff. In Varsity, the Court held, inter alia, that ERISA authorized a lawsuit for individualized equitable relief; however, in doing so, the Court first examined whether the plaintiffs in that case could proceed under any other subsection where Congress elsewhere provided adequate relief for a beneficiary's injury. Varsity, 516 U.S. at 515 ("[W]e should expect that where Congress elsewhere provided adequate relief for

a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be `appropriate.'"). While the plaintiffs in Varity could not proceed under the first subsection -- § 502(a)(1)(b), as amended, § 1132(a)(1)(b) -- because they were no longer members of the benefits plan in that case, the instant action is distinguishable in this regard. Here, Plaintiff is employed as the President of the Reilly Foam Corporation and continues to be a covered employee in the group health plan at issue. See First Amended Complaint, ¶ 5.

Following the Supreme Court's decision in Varity, the Third Circuit, in Ream, likewise held that an individual beneficiary could bring an action under ERISA § 502(a)(3), allowing participants to seek other appropriate equitable relief against a former trustee for breach of fiduciary duties. Ream, 107 F.3d at 153. In doing so, however, the Third Circuit observed the following:

[T]his is not a case in which an individual plan beneficiary charges a fiduciary with a breach of fiduciary duties with respect to a functioning plan. In that situation, it might be inappropriate to permit a beneficiary to seek personal relief as a recovery by the plan effectively would make the beneficiary whole. We emphasize, therefore, that a court must apply ERISA § 502(a)(3)(B) cautiously when an individual plan beneficiary seeks "appropriate equitable relief." Such caution would be consistent with the concerns the Supreme Court expressed in Varity about a court being too expansive

in granting relief. Varity, ____ U.S. at ____,
116 S. Ct. at 1079.

Id. at 152-53. "Thus, . . . where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need of further equitable relief, in which case such relief normally would not be 'appropriate.'" Varity, 516 U.S. at 515.

In this case, the Plaintiff seeks to recover the following: (1) reliance damages in an amount necessary to place Plaintiff in the same position that he would have been in had he not detrimentally relied on Keystone's conduct, and/or had Keystone otherwise performed in accordance with its fiduciary duties; (2) injunctive relief to compel Keystone to pay restitution to Dr. Gollomp for costs that have accrued to date to administer Botox injections to Plaintiff to avoid any future lapses in treatment; (3) injunctive relief to compel Keystone to compensate Dr. Gollomp, and/or any other qualified medical personnel for all future Botox injections as may be prescribed for Plaintiff to avoid future lapses in administration of such treatment; (4) injunctive relief to enjoin Keystone from engaging in conduct that may jeopardize Plaintiff's future ability to obtain and receive continued Botox injections for the treatment of his spasmodic torticollis; (5) punitive damages; (6) attorneys' fees; (7) costs incurred by Plaintiff in this civil cause of action; and (8) an award of additional relief that this Court deems appropriate. First Amended Complaint at 8-9.

In order to obtain the above damages, Plaintiff has brought this action under both § 1132(a)(1)(B) and § 1132(a)(3) of ERISA. First Amended Complaint at 1, ¶1. Section 1132(a)(1)(B) of ERISA provides that "[a] civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502(a)(1)(B), as amended, 29 U.S.C.A. § 1132(a)(1)(B). Section 1132(a)(3) also allows a participant or beneficiary to bring a civil action; however, the relief that can be sought under this subsection is limited to enjoining any act or practice which violates any provision of ERISA or the terms of the plan, or obtaining other appropriate equitable relief to redress such violations or to enforce any provisions of ERISA or the terms of the plan. ERISA 502(a)(3), as amended, 29 U.S.C.A. § 1132(a)(3).

Here, it appears that Plaintiff can obtain adequate relief, as envisioned by the Court in Varity, by proceeding under subsection 1132(a)(1)(B). However, "the Third Circuit Court of Appeals has held that extracontractual damages cannot be recovered under section 1132(a)(1)(B) of ERISA." Huss v. Green Spring Health Servs., 18 F. Supp.2d 400, 407 (D. Del. 1998) (citations omitted). Furthermore, Plaintiff must show some evidence of damages recoverable pursuant to his ERISA claim or

risk the dismissal of the remaining aspects of his First Amended Complaint. See In re Unisys Savings Plan Litigation, 173 F.3d 145, 159 (3d Cir. 1999) ("As Meinhardt and the other class plaintiffs were seeking individual relief under 29 U.S.C. § 1132(a)(3) . . . , Meinhardt was required to prove individual losses.").

Based on the above, Keystone's Motion for Summary Judgment will be granted with respect to extracontractual damages. In addition, Plaintiff will be directed within twenty (20) days from the date of this Memorandum and accompanying Order to produce evidence of damages recoverable pursuant to the ERISA claim sustained by the Plaintiff in this matter. An appropriate Order will follow.

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Civil Action No. 98-1648

ORDER

AND NOW, this 22nd day of July, 1999, upon consideration of Defendant Keystone Health Plan East, Inc.'s Motion for Summary Judgment, and Plaintiff's Response thereto, it is hereby ORDERED that Keystone's Motion for Summary Judgment will be GRANTED with respect to extracontractual damages. It is further ORDERED that Plaintiff will be directed within twenty (20) days from the date of this Order to produce evidence of damages recoverable pursuant to the ERISA claim sustained by the Plaintiff in this matter or risk the dismissal of the remaining aspects of his First Amended Complaint upon further application to this Court by Defendant.

BY THE COURT:

ROBERT F. KELLY, J.